91-1799

(1)

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CLEMENT J. PACYNA,

Petitioner

versus

JOHN O. MARSH, JR., in his capacity as Secretary of the Army,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS INVOLVED

1. The principle question for decision is whether the United States District Court had statutory authority to entertain the suit from the outset under 28 U.S.C. 1346, the Tucker Act?

2. If not, should the order of the Court of Appeals be reversed, the judgment of the District Court be vacated, and the case be remanded to litigate the claim for review of agency action held at bay by the judgment?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No.

CLEMENT J. PACYNA, Petitioner

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JOHN O. MARSH, JR., Secretary of the Army

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is not reported. The opinion of the District Court (App. C) is not reported.

JURISDICTION

The summary order of the Court of Appeals was entered on January 24, 1992 (App. A). A timely petition for rehearing

was denied on February 20, 1992 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTION AND STATUTES INVOLVED

1. CONSTITUTION, Amend. I, V and XIV.

2. 5 U.S.C. 702 provides in pertinent part.

> "action in a court of the United States seeking relief other that (sic) money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States."

3. 10 U.S.C. 1552 provides in part:

> "(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when it considers it necessary to correct an error or remove an injustice. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."
>
> "(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative

files a request therefor before 26 October 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice."

4. 28 U.S.C. 1346(a)(2) provides in pertinent part:

"The district courts shall have jurisdiction of any civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States".

5. 28 U.S.C. 1361 provides:

"Action in the nature of mandamus to compel an officer of the United States ... to perform a duty owed to the plaintiff."

6. 28 U.S.C. 2401(a) provides:

"(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

7. 28 U.S.C. Rule 60(b) provides for motion for relief. "(4) the judgment is void; (6) any other reason justifying relief from the operation of the judgment."

STATEMENT OF THE CASE

This is a petition for relief from the 1992 Order of the Second Circuit Court of Appeals affirming the 1991 Order of the District Court's denial of Rule 60(b)(4)(6) relief to vacate the District Court's 1984 Order (App. D) and 1984 Judgment (App. E) for plain usurpation or lack of statutory required subject matter jurisdiction.

The circuit court held substantially that the District Court had jurisdiction of the suit to render the judgment; that the suit against the United States was barred by the statute of limitations; that the judgment was ultimately affirmed by the Federal Circuit; that the denial of the Rule 60(b) motion was well within the district court's discretion; and that the judgment may not be collaterally attacked for lack of subject matter jurisdiction, since the exercise of jurisdiction was in all likelihood correct and, in any event, not a clear usurpation

of jurisdiction.

STATEMENT OF FACTS

On February 23, 1983 petitioner filed a simple federal suit in the Western District of New York soley for review, with emphasis added, of a final decision on July 20, 1982 of the Secretary of the Army (Acting through the Army Board for Correction of Military Records (ABCMR), hereafter ABCMR, conferred by 10 USC 1552 and 28 USC 1361 (with 5 USC 702 added later), on the grounds, inter alia, that its decision was arbitrary and capricious or in violation of its mandate and Petitioner's Amendment rights.

Paramount to this case is the fact that the action for sole review in the Petitioner 's Complaint is substantiated in the District Court's 1991 Order (App. C1) and 1984 Order (App. D1), as underlined thereof.

In its March 7, 1984 Order, the District Court held substantially that it had jurisdiction of the suit under 28 USC 1346; that

the suit was barred by the statute of limitations under 28 USC 2401(a) (App. D); that the Defendant's motion for summary judgment was granted; and that the Complaint was dismissed (App. E).

ARGUMENT

A. THE DISTRICT AND APPEALS COURTS' ACTIONS ARE FATALLY FLAWED.

The decision of the Second Circuit Court of Appeals is simply erroneous on its face as it does not agree with the Constitution and Statutes from their beginning in time. It does conflict with the decisions of this Court and of other Circuit Courts of Appeals. Review is warranted on the substantial and important questions presented, supra.

1. Petitioner challenges the District Court's Order/Opinion unsupported on the record that it had original jurisdiction of the suit under 28 USC 1346 (App. D6, D7).

Petitioner vigorously contends, supported on the record, that its 1984 Order/Opinion and Judgment are fatally flawed on

the grounds of the absence of subject matter jurisdiction rendering that court's action null and void because there is clearly a plain usurpation of power where that court violated sovereign immunity when it illegally extended its jurisdiction beyond the scope of its authority under §1346, barring suit applicable to 28 USC 2401(a), as distinguished from an error in the exercise of jurisdiction (Fed-Rules Civ. Proc. Rule 60 (b)(4)(6) U.S.C.A.) See Kansas City Southern Ry. Co. v. Great Lakes Carbon, 624 F.2d 822 (8th Cir. 1980); V.T.A., Inc. v. Airco, Inc, 597 F.2d 220 (10th Cir. 1979), affirmed.

The jurisdictional issue, as such, did not surface until Petitioner brought his motion for relief from the void judgment and order/opinion under Fed. R. Civ. Proc. Rule 60(b)(4)(6) in 1991. Petitioner contends that the District Court had in fact abused its discretion by denying such relief to vacate. Therefore, the affirmation Summary

Order of the Court of Appeals is unequivocally simply erroneous.

Petitioner relies upon the First, Fifth and Fourteenth Amendments and Statutory provisions, supra, and applicable case authorities of this Court and of other circuit courts' of appeals, cited in detail below.

As aforementioned, Petitioner's 1983 filed Complaint and the District Court's own 1991 Order and 1984 Order clearly show that his suit soley sought review of a 1982 final decision of the ABCMR, conferred by Acts of Congress, not the alleged error or injustice in the Army's denial of a promotion recorded in his military records Circa 1952. As Petitioner's suit for review, which accrued in 1982, filed in 1983 did rise under §702, §1361 and §1552, not §1346, it is not subject to the statute of limitations.

In fact, the District Court had no authority of the case under §1346 under any theory of law, supported by the government

on the record. The District Court in its Order/Opinion (App. D6,D7), respectively, said that "Although the government vigorously urges that the court does not have jurisdiction under any theory, I find that there is jurisdiction under 28 U.S.C. §1346. Plain- has waived his claim to any monetary award over $10,000."

Petitioner emphatically states that he made no such waiver on any claim enforceable against the United States.

The Tucker Act (28 U.S.C. §1346) which merely confers jurisdiction upon the District Court whenever a substantial right enforceable against the United States for money damages exists, does not in itself support the action taken by the District Court in this case.

The wrongful alleged waiver did not create a substantive right of monetary award for jurisdiction under §1346.

The Petitioner did not state a claim on

a position had upon a contract required under §1346(a)(2). The established stare decisis rule of this Court is that one is not entitled to the benefit of a position until he has been duly appointed. That a waiver of the traditional sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. at 4 (1969). Also see United States v. Testan, 424 U.S. 392, 396, 402 (1976) citing United States v. McLean, 95 U.S. 750 (1878); and Ganse v. United States, 180 Ct. Cl. 183, 186, 376 F.2d 900 (1967).

In all four of the above named cases the Courts reversed and remanded to dismiss for lack of jurisdiction.

The District Court did not meet any of the requirements to rule that it had jurisdiction under §1346. As pointed out in Van Drasek v. Lehman, 762 F.2d 1065 (D.C. Cir., 1985):

"For a claim in the district court to be based on the Tucker Act, it must (1) seek

money (2) not exceeding $10,000 (3) from the United States and (4) be founded upon a contract or a provision of "the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. §1346." "If any of these requirements are not met, the claim falls outside the scope of the Tucker Act, and this court would retain appellate jurisdiction of the entire case."

The United States as sovereign is immune from suit save as it consents to be sued. In this case, the United States did not consent to be sued under §1346, contrary to the opinion had by the District Court, as no contract existed required under that statute. See United States v. Sherwood, 312 U.S. 584 and case law cited therein. In Sherwood, this Court reversed, pointing out: "The matter is not one of procedure but of jurisdiction whose limits are marked by the government's consent to be sued." "The question for decision is whether a United States District Court has jurisdiction to entertain the suit."

The rule has frequently been declared that in the absence of an express agreement

(contract) or statutory authority, a suit may not be allowed on a claim against the United States and, as such, does not rest upon the Fifth Amendment. See Jacobs v. United States, 290 U.S. 13, reversed (1933).

In the instant case, the District Court created jurisdiction on a non existing suit under §1346, not plainly enforceable on the record or in Petitioner's Complaint.

In United States v. King, supra, this Court reversed, holding substantially that in the absence of an express grant of jurisdiction from Congress, this Court declined to assume that the court below has been given the authority to issue judgments. Further, it has been held that a court's jurisdiction depends wholly upon the estent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed, citing United States v. Sherwood, Supra.

The District Court illegally applied jurisdiction under §1346, barring suit ap-

plicable to the statute of limitations, when it applied the Army's violations in Circa 1952, not the claim for review of the ABCMR's final decision accrued in 1982.

The Petitioner properly first presented his grievance to the ABCMR, which finally rejected it on July 20, 1982 (App. G). The six year statute of limitations should be held to have run from that date, not 1952. For it is a general rule that, where a claim must first be processed by an administrative agency, it does not accrue until the agency denies the claim. See Soriano v. United States, 352 U.S. 279, 1957, affirmed, citing United States v. Taylor, 104 U.S. 216, 222. Cf United States v. Clark, 96 U.S. 37,43,44.

The limits placed by Congress on the scope of review in this Court of judgments of the District Court or Court of Appeals do not deprive defeated claimant of due process of law under the Fifth Amendment. See

Luckenback S.S. Co. v. United States, 272 U.S. 533, 1926, affirmed.

2. Petitioner challenges the Court of Appeals Summary Order, supra, that the denial of the Rule 60(b) motion was well within the District Court's discretion; that the judgment may not be collaterally attacked for lack of subject matter jurisdiction; that the matter is res judicata and that since the exercise of jurisdiction was in all likelihood correct and, in any event, not a clear usurpation of jurisdiction.

As aforementioned, the issue of jurisdiction did not surface until Petitioner brought his motion for relief under Rule 60(b)(4)(6) in 1991.

Neither the District Court nor Court of Appeals "explicitly" explained just how the District Court had jurisdiction at the outset of the suit under §1346 barring suit by the statute of limitations because they could not do so, based on the clear and

convincing evidence supported on the record and in the argument presented above and below.

Based on the facts, laws, statutes and Amendment rights mentioned hereof, the District Court, as aforementioned, had no statutory jurisdiction or consent of Congress of the suit under §1346 because Petitioner had not stated a claim upon which relief could be granted under that statute. See United States v. Testan, supra, and case law cited therein.

Therefore, the decision of the Court of Appeals is simply erroneous because the District Court's 1984 judgment and Order are null and void mandating vacature.

The Court of Appeals opinion that the matter is res judicata and not subject to collateral attack is in conflict with stare decisis rulings below. The doctrine of res judicata is well established and its basic principles are familiar. An invalid judgment

does not bar a direct or collateral attack. An earlier judgment does not preclude subsequent litigation of issues not actually decided in a first action and of issues that were raised therein but were not.

It is well established in principles of public policy and case law that a judgment that is void is no judgment at all and does not operate as an estaopple under res judicata principles or precluding collateral attack, and that all judgments, orders, decisions, etc. derived from a tainted judgment are likewise a nullity. A void judgment is one which from its inception was a complete nullity and without legal effect. In this instant case, there was a clear usurpation of power causing the District Court's action or judgment at the outset void. See Lubben v. Selective Service System Local Bd. No. 27, 453 F.2d 645 (1st Cir. 1972), reversed; V.T.A., Inc. v. Airco, Inc., supra.

The Court of Appeals affirmation of the District Court's opinion that waiver of the $10,000 in amount gave it jurisdiction under §1346 and as such is not subject to collateral attack, is directly in conflict with case law mentioned above and below respectively on the issue. (See pages 26,27,28).

Any jurisdictional fact prescribed by statute is absolutely essential and cannot be waived and the want of it may be raised at any stage of the cause. See Mason v. Hitchcock, 108 F.2d 134 (1st Cir. 1989) citing U.S. Envelope Co., et al v. Transo Paper Co. et al, D.C. 229 F. 576, 579; Chicago B&O v Willard, 220 U.S. 413, 31 S. Ct. 460, 55 L.ed 521; and Goldstone v. Payne, 94 F.2d 855 (2d Cir. 1938). In Mason, and especially Goldstone rendered by the Second Circuit Court of Appeals itself, the courts reversed for lack of jurisdiction under similar circumstances under Rule 60(b) here. Also see Rensing v. Turner Aviation Corp.,

166 F. Supp. 790; Maxwell v. Benson, 173 F. Supp. 75, D.C. Iowa, 1959; Consolidated Co. v. Martin, 39 F. Supp. 567, D.C. La., 1941; South Carolina Public Svc Authority v. New York Cas Co., 74 F. Supp. 831.

In addition the Second Circuit Court of Appeals decision here is in conflict with its earlier decision in McLearn v. Cowen & Co., 660 F.2d 845 (2d Cir. 1981) in which it reversed pointing out:

"Much of the litigation in this action obviously could have been avoided had the district court made it clear at the outset whether it exercised ... jurisdiction in dismissing the ... claims," and

"The proper route by which plaintiff should have sought relief from the ... dismissal would have been a motion under Fed. R. Civ. P. 60(b)(4) to vacate the judgment for lack of jurisdiction. Such a motion may be brought at any time after final judgment. See Crosby v. Bradstreet Co., 312 F.2d 483 (2d Cir. 1963)."

Petitioner contends that in this instant case where the judgment is void for plain lack of subject matter jurisdiction, his within motion in accordance with clauses (4) and (6) is not subject to limitations as it

has no time limit. See Marquette b. Priester, 234 F. Supp. 799 (1964) and Hawkeye v. Porter, 95 F.R.D. 417 (1982), which reversed setting aside judgments on motions for relief under Rule 60(b), respectively.

B. RIGHT OF REVIEW OF AGENCY ACTION IS MANDATED BY LAW.

1. As aforementioned, that where wrong for which plaintiff sought judicial redress was not alleged error or injustice in his military record, which was committed, if at all, at time of his denial of promotion Circa 1952 or at the latest upon his retirement, but the alleged arbitrary and capricious deprivation of his right, conferred by Act of Congress, to an action "necessary to correct an error or remove an injustice," his suit was not barred by the statute of limitations when filed in February 1983, after his June 1980 application to correct records had been finally denied on July 20, 1982 (App. F). See Uhley v. United States,

121 F. Supp. 674 Ct. Cl. (1954), and case authorities referred to below.

The District Court or no prior court has litigated Petitioner's suit for the action for review of the ABCMR'S arbitrary and capricious deprivation of his right, conferred by §702, §1361 and §1552, supra.

The District Court's tainted judgment from the outset barring suit by the statute of limitation and the denial of Petitioner's motion for relief under Rule 60(b)(4)(6) by the courts' below are holding at bay his suit for review of the ABCMR'S action, in violation of Amendment rights and statutes, supra, and in conflict with the decisions of other courts on the subject of "Right of Review."

Prevalent case law holds that it is the duty of Federal Courts to inquire whether an action of a military agency conforms to the law, or is instead arbitrary, capricious or contrary to the statutes and regulations

(AR 15-185) governing that agency. See Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979); Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967), in which these courts reversed and remanded; Yee v. United States, 512 F.2d 1383 (1975); and Blevins v. Orr, 721 F.2d 1419.

Additional case authorities in support of review of agency action on claims dating as far back as 38 years, respectively, but not limited to, are: Kaiser v. Sec. of Navy and Board for Correction of Naval Records, 525 F. Supp. 1226; Mulvaney v. Stetson, 470 F. Supp. 725; Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); Nolen v. Schlesinger, 492 F.2d 787 (5th Cir. 1974); and Hamlin v. United States, 391 F.2d 941.

Contrary to the District Court's opinion at the outset that it had jurisdiction under §1346, it had no power over military positions, even had the claim, not the case here, accrued in 1952. Case law has held

that federal courts have no power over military positions. The President alone, authorized by Congress commissions all Army officers, 5 U.S.C. 11. It has been held that except one holds his appointment by virtue of a commission from the President, he is not an officer of the Army. As aforementioned, Petitioner did not have a position or contract as such to give jurisdiction to the District Court under §1346. See Orloff v. Willoughby, 345 U.S. 83, 90 (1953) citing United States v. Mouat, 124 U.S. 303.

Further incongrous, is the fact that the courts below relied on Nemaizer v. Baker, 793 F.2d 58 (2d Cir. 1986) in their denial in the instant case. There is no similarity between Nemaizer and the instant case. Nemaizer was not a unanimous but rather a split decision or controvertial on a matter challenging an "adverse judgment" on a state issue, as opposed to a federal statute or involving a void judgment here.

2. As aforementioned, Petitioner first discovered suffering a legal wrong at the hands of the Army in 1980. His application seeking relief was not time barred by the ABCMR (App. F). His grievance to the ABCMR was that the disapproval of his appointment to Warrant Officer Circa 1952, resulted from the Army's prevalent violations of its own regulations AR 600-148, implementing AR 610-15, and Amendments rights.

The government does not dispute the violations, which are supported on the face of the record, and in part are admitted by the Army in writing. The violations briefly are as follows: (1) no notification was given of the reasons for disapproval, although required (App. G); (2) Petitioner was directed by his superiors not to question higher authority when he attempted to ascertain the reason(s); (3) after Petitioner's complete application was submitted in accordance with directives (App. G), a crucial document of

his papers was lost by the Army resulting in the final decision rendered on an incomplete application, although required to be complete; and (4) The Army was required to return the incomplete application but did not do so for completion and resubmission.

Where military fails to adhere to its own rules and regulations in prejudice to one of its members, federal courts have jurisdiction to compel compliance. District Court jurisdiction is limited to a review of the record for substantial evidence and whether there has been compliance with the military rules and regulations and with the law. See Austin v. United States, 393 F. Supp. 291 (1975), ruling judgment for plaintiff.

Here, we have on the face of the record which was before the District Court, the Army's aforementioned letter (App. G) clearly showing no notification of the reason(s) given for disapproval of promotion, and the

Army Regulation AR 600-148, Section II par. 7e and Section III par. 9e, requiring same, but violated, and the ABCMR'S arbitrary and capricious denial.

The District Court's 1984 opinion that "Because of his 28 year delay in challenging the decision made in 1952, only limited documentation is available"(App. D3), is further tainted for reasons supported on the record as follows: (1) No trial was held by the District Court to make such finding; (2) The quoted words were taken virtually verbatim from page 5 of the Defendant's Memorandum of Law, dated June 2, 1983; (3) The suit when filed in 1983, was for review of the final decision of the ABCMR accrued in 1982 and conferred by Acts of Congress, as aforementioned, and further as aforementioned the Army violations were only discovered in 1980 and not time barred by the ABCMR; and (4) The Army furnished all documentation applicable to the application for promotion

and reported in writing that the only documentation not found on file is the Petitioner's prerequisites with commander's comments, which the Army lost, aforementioned. This resulted in a serious impact on Petitioner's military career without promotion from 1951 until his retirement in 1962.

The issues here concerned raise substantial and important questions of law that have not been but should be resolved by this Court.

The following are cases decided by this Court applicable to the instant case at bar:

Granted Certiorari, 311 U.S. 640, finding "The question of the jurisdiction of the District Court under the Tucker Act being of public importance" United States v. Sherwood, supra.

Granted Certiorari, 289 U.S. 719, finding "The only question before us is as to the right to the item of interest", brought

under the Tucker Act, Jacobs v. United States, supa.

Granted Certiorari to decide the question whether the court below had the express grant of jurisdiction from Congress, as both substantial and important, United States v. King, supra.

Granted Certiorari in United States v. Testan, supra, finding:

"The Tucker Act, which merely confers jurisdiction upon the Court ... whenever a substantive right enforceable against the United States for money damages exists, does not in itself support the action taken by the Court ... in this case."

Denied Certiorari, 95 S. Ct. 1996, 421 U.S. 991, upholding Jordan v. Gilligan, C.A. Ohio 1974, 500 F.2d 701. In Jordan, the court reversed and vacated judgment, pointing out: [1/]

"A Party cannot be precluded from raising the issue of voidness in a direct or

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1. In light of this case analysis it is clear that the denial of Petitioner's motion to vacate under Fed. R. Civ. P. (60(b) is erroneous and an abuse of discretion.

collateral attack because of failure to object to, or at time of, entry of judgment."

"Void judgment is a legal nullity and may be challenged not only directly but also by collateral attack in a proceeding in any court where its validity has come into issue. Graciette v. Star, D.C.N.Y. 1975, 66 F.R.D. 424."

"The doctrine of "res judicata does not preclude a litigant from making direct attack (under Rule 60(b) upon the judgment before the court which rendered it." 1B J. Moore, Federal Practice § 0.407 at 931 (2d ed. 1973). See United States Fidelity Guaranty Co., 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894 (1940); see also Lubben v. Selective Service System Local Bd. No. 27, supra, 453 F.2d at 649."

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted.

S/Clement J. Pacyna
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1151 Wehrle Drive
Williamsville, New York 14221

Dated: May 1st, 1992

APPENDICES

JON

WDNY
83-cv-205
Curtin

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 24th day of January, one thousand nine hundred and ninety-two.

PRESENT: HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.
HONORABLE THURGOOD MARSHALL,
Associae Justice Retired.*

CLEMENT J. PACYNA,
Plaintiff-Appellant,

v. 91-6196

JOHN O. MARSH, JR., in his capacity as Secretary of the Army,
Defendant-Appellee.

O R D E R

Appeal from the United States District Court for the Western District of New York

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* of the United States Supreme Court, sitting by designation.

(John T. Curtin, Judge).

This cause came on to be heard on the transcript of record from the United Ststes District Court for the Western District of New York and was taken on submission.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Clement J. Pacyna appeals from a judgment denying his Rule 60(b) motion to vacate the District Court's 1984 judgment, which had ruled that his suit against the United States was barred by the statute of limitations. That judgment was ultimately affirmed by the Federal Circuit, Pacyna v. Marsh, 809 F.2d 792 (Fed. Cir. 1986) (table), cert. denied, 481 U.S. 1048 (1987). Pacyna renews his challenge to that judgment in order to vitiate its res judicata effect upon his subsequent suit, which was also dismissed by the District Court. See Pacyna v. Marsh, 873

F.2d 1435 (2d Cir.) (table), cert. denied, 110 S. Ct. 74 (1989).

Denial of the Rule 60(b) motion was well within the District Court's discretion. The 1984 judgment may not be collaterally attacked for lack of subject matter jurisdiction, as Pacyna contends, see Nemaizer v. Baker, 793 F.2d 58, 65 (2d Cir. 1986), since the exercise of jurisdiction was in all likelihood correct and, in any event, not a clear usurpation of jurisdiction.

S/ Jon O. Newman

S/ Amalya L. Kearse
Circuit Judges.

S/ Thurgood Marshall
Associate Justice.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES COURT OF APPEALS
FOR THE DECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 20th day of February one thousand nine hundred and ninety two.

Present:

Hon. Jon O. Newman,

Hon. Amalya L. Kearse,
Circuit Judges.

Hon. Thurgood Marshall,
Associate Justice Retired.*

CLEMENT J. PACYNA,
Plaintiff-Appellant,

v. Docket No. 91-6196

JOHN O. MARSH, JR., in his capacity as Secretary of the Army,
Defendant-Appellee.

A petition for rehearing having been filed by plaintiff-appellant, pro se, Clement J. Pacyna.

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* of the United States Supreme Court, sitting by designation.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition be and it hereby is DENIED.

S/ Elaine B. Goldsmith
T/ Elaine B. Goldsmith,
Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CLEMENT J. PACYNA,

Plaintiff,

-vs- CIV-83-205C

JOHN O. MARSH, JR., in his capacity as Secretary of the Army,

Defendant.

Pending is the motion of the plaintiff to vacate this court's judgment. Plaintiff relies upon Rule 60(b)(4) and (6) of the Federal Rules of Civil Procedure. He argues that the judgment rendered by this court was void for lack of jurisdiction.

The facts in this case were set forth in the court's original opinion, Pacyna v. Marsh, 617 F. Supp. 101 (W.D.N.Y. 1984). In his claim, plaintiff sought review of an action of the Secretary of the Army. He alleged that in 1952, he was denied a promotion to Warrant Officer in the Army Counterintelligence Corps. He retired from

the Army in 1962 and, in 1980, filed an application with the Army Board for the Correction of Military Records seeking reversal of the denial of his promotion and sought correction of the record. The court found jurisdiction under 28 U.S.C. § 1346 since "(p)laintiff has waived his claim to any monetary award over $10,000." Id. at 103. This court held that the action was barred by the statute of limitations, which required a civil suit to be brought within six years of the time it accrues. After this court's decision was affirmed by the Second Circuit, Pacyna v. Marsh, 751 F.2d 374 (2d Cir. 1984), the Supreme Court held that the appeal should have been heard by the Federal Circuit. Pacyna v. Marsh, 106 S.Ct. 844 (1986). The Federal Circuit also affirmed, Pacyna v. Marsh, 809 F.2d 792 (C.A.F.C. 1986). The application for certiorari was denied, 107 S.Ct. 2177 (1987). In December of 1987, the plaintiff filed another action

in this court again seeking review of the action taken by the Army Board for Correction of Military Records. He asserted jurisdiction under 5 U.S.C. 702 stating that his claim had not been previously reviewed under that section. On August 16, 1988, Honorable John T. Elfvin dismissed that action as being barred by res judicata. The plaintiff again went to the United States Court of Appeals for the Second Circuit, which affirmed Judge Elfvin's decision, 873 F.2d 1435 (2d Cir. 1989). His application for certiorari was denied.

Without question, Mr. Pacyna had adequate opportunity to challenge the subject matter of this court during the initial proceedings but has failed to do so. Nemaizer v. Baker, 793 F.2d 58 (2d Cir. 1986), is controlling. As the court pointed out in that case, final judgment should not be lightly reopened, and Rule 60(b) should only be invoked upon a showing of exceptional

circumstances. Exceptional circumstances are not shown here.

The motion of plaintiff for relief under Rule 60(b) is denied.

So ordered.

S/ John T. Curtin
T/ JOHN T. CURTIN
United States District Judge

Dated: June 14, 1991

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MEMORANDUM DECISION
CIV-83-205C

CLEMENT J. PACYNA,

Plaintiff

v.

JOHN O. MARSH, JR.,
Secretary of the Army,

Defendant.

In this case, plaintiff seeks review of a final decision of the Secretary of the Army. Defendant moves to dismiss on the ground that plaintiff has failed to state a claim and, in the alternative, for summary judgment. The basis for these motions is lack of jurisdiction, statute of limitations, and laches.

The history of this litigation is a long one. It began in 1951, when plaintiff was serving as a master sergeant and applied for an appointment as a warrant officer in the Counter-intelligence Corps (CIC). Although he received approval from his local

commanders, on January 3 (sic), 1952, he was informed that his application did not receive final approval.

Plaintiff continued in military service until 1962, when he retired from the Army with the status of "retired reserve." Nothing occurred after that until February of 1979, when plaintiff made an application through the Freedom of Information Act and examined his personnel file.

On June 13, 1980, plaintiff filed an application with the Army Board for Correction of Military Records (ABCMR), seeking to have his 1952 promotion denial reversed and his records corrected accordingly. Plaintiff claims that his application was timely because it was filed within three years after he discovered the error in his record. In the fall of 1980, the ABCMR solicited and obtained an advisory opinion from the Office of the Judge Advocate General. A copy of the opinion, which re-

commended that plaintiff's claim be denied, was sent to him for his comment. Plaintiff responded in February of 1981.

After considering plaintiff's response, the Board concluded that plaintiff had not given any reason to explain why the action not to appoint him was illegal or in violation of regulations. The Board also held that his failure to timely file his application had made efforts by the Army to investigate his claim difficult. Because of his 28-year delay in challenging the decision made in 1952, only limited documentation is available. This decision was affirmed by the Secretary of the Army on June 7, 1982. Plaintiff's suit followed in February, 1983, with plaintiff claiming that failure to appoint him as a warrant officer was an abuse of discretion and a violation of his rights. He seeks an order of the court appointing him to the rank of warrant officer and retirement pay, including back

payment to the time of the initial denial.

Assuming for the moment that this court has jurisdiction, it is clear that plaintiff's claim is barred by the statute of limitations. 28 U.S.C. §2401(a) provides that a civil suit against the United States must be commenced within six years after the right of action first accrues. The statute may not be waived in actions against the United States. United States v. Kubrick, 444 U.S. 111 (1979). "(A) cause of action is deemed to have accrued when facts exist which enable one party to maintain an action against another." Konecny v. United States, 388 F.2d 59, 65 (8th Cir. 1967), quoting Great American Ins. Co. v. Louis Lesser Enterprises, Inc. 353 F.2d 997, 1001 (8th Cir. 1965).

The file in this case was complete in 1952, when plaintiff's application for promotion was rejected. Plaintiff argues that he was not able to obtain the facts

until he looked at his personnel file through a Freedom of Information Act Procedure in 1979, but there was no reason why he could not have reviewed his personnel records at an earlier date. Even if the statute of limitations was tolled during the period plaintiff remained on active duty, pursuant to the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S. C. App. §501 et seq., his cause of action would have accrued upon his retirement in 1962.

Cases such as Kaiser v. Secretary of the Navy, 525 F.Supp 1226 (D. Col. 1981), cited by Plaintiff in support of his application, do not apply here. The statute of limitations did not apply in Kaiser, because the nature of the relief sought in that case was to correct a discharge from dishonorable to honorable. In that type of case, or cases in which the applicant seeks to expunge the judgment of a court martial,

the statute of limitations is not a bar. However, in cases like the present one where the relief sought is money, the statute of limitations is a bar if the case is untimely filed. In this case, the plaintiff wants his records corrected and, at the same time, he wants the government to increase his retirement pay.

Plaintiff cannot revive his claim by applying to the ABCMR in 1981 and claiming that the 1982 decision revived the jurisdictional statute. To do this would permit a plaintiff to have the power to avoid the jurisdictional bar every time he submitted an application which was considered by the Board. Thus, whether his claim accrued in 1952 or at the time of his retirement in 1962, the time to institute the suit has long passed.

Although the government vigorously urges that the court does not have jurisdiction under any theory, I find that there is

jurisdiction under 28 U.S.C. §1346. Plaintiff has waived his claim to any monetary award over $10,000.00.

Defendant's motion for summary judgment is granted, and the complaint is dismissed.

So ordered.

/S/ JOHN T. CURTIN
USDJ

Dated: March 7, 1984.

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JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CLEMENT J. PACYNA

v. Docket No. Civ-83-205C

JOHN O. MARSH, JR.,
Secretary of the Army

NAME OF JUDGE: HONORABLE JOHN T. CURTIN

" ☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict."

" ☒ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered."

IT IS ORDERED AND ADJUDGED

That defendant's motion for summary judgment is granted, and the complaint is dismissed.

/S/ JOHN K. ADAMS
JOHN K. ADAMS, Clerk

Buffalo, New York, DATE: March 8, 1984

HEADQUARTERS FIRST ARMY
GOVERNORS ISLAND, NEW YORK 4, N.Y.

AHFAG-MP 201 Pacyna,Clement J. 22 JAN 1952

SUBJECT: Temporary Appointment as Warrant Officer

THRU: Commanding Officer
108th CIC Detachment
Boston Army Base
Boston, Massachusetts

TO: M/Sgt Clement J. Pacyna, RA20275571

1. Your application for temporary appointment as warrant officer was received at this headquarters and you were tentatively selected for appointment. Your application was forwarded to The Adjutant General in accordance with current directives.

2. The Adjutant General has informed this headquarters that your appointment as warrant officer, junior grade, Army of the United States in Counter-intelligence career warrant is not favorably considered.

BY COMMAND OF

LIEUTENANT GENERAL CRITTENBERGER:

/S/JEROME L. BAES
JEROME L. BAES
1st Lieut, AGC
Asst Adj Gen

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310
20 Jul 1982

SFMR

Mr. Timothy R. Lovallo, Esq.
950 Ellicott Square Building
Buffalo, New York 14203

Dear Mr. Lovallo:

This is in reply to your letter of 7 July 1982 to the Deputy Assistant Secretary concerning the case of Master Sergeant Clement J. Pacyna, 106-05-7846, United States Army Retired.

Your vigorous dissent has been noted. However, all evidence currently of record clearly indicates that there was no material error or injustice in the Department's denial of Sergeant Pacyna's application for appointment as a warrant officer in 1952.

Please be advised that within the Department of Defense, the authority to effect the change you seek in Sergeant Pacyna's records can be exercised only through the

Board for Correction of Military Records. Accordingly, there is no higher administrative appeal within the Department of Defense.

Should you discover additional substantive evidence not previously submitted, you may ask for reconsideration of Sergeant Pacyna's case. Otherwise this letter constitutes final agency action on his request for correction of military records. However, if you desire additional review of the Board's actions, then you have the right to institute action in a Federal court of competent jurisdiction.

Sincerely,

/s/JOHN W. MATTHEWS
JOHN W. MATTHEWS
Executive Secretary
Board for Correction
of Military Records